

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**IDALIA HERNANDEZ**  
Claimant

VS.

**TYSON FRESH MEATS, INC.**  
Self-Insured Respondent

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Docket No. 258,902

**ORDER**

Through her present attorney, Diane F. Barger, claimant appealed the July 25, 2006, Order for Attorney Fees entered by Administrative Law Judge Brad E. Avery. The Board placed this appeal on its summary docket for disposition without oral argument. Both Ms. Barger and claimant's former attorney, Michael G. Patton, filed briefs with this Board setting forth their respective arguments.

**ISSUES**

This appeal principally concerns a dispute regarding the division of attorney fees and two attorneys' requests for sanctions against the other.

In September 2005, this Board remanded the claim to Judge Avery to address Mr. Patton's request for fees as claimant's former attorney. Upon remand, Mr. Patton requested Ms. Barger's time and expense records, which Judge Avery ordered Ms. Barger to produce. In addition, Mr. Patton also requested sanctions against Ms. Barger for failing to produce those records. On the other hand, Ms. Barger requested sanctions against Mr. Patton for requesting her records under discovery statutes in Chapter 60 of the Kansas Statutes Annotated.

In the July 25, 2006, Order for Attorney Fees, Judge Avery awarded Mr. Patton attorney fees in the sum of \$3,022.97, which was 25 percent of the 10 percent permanent partial general disability benefits respondent began paying claimant while Mr. Patton represented her. The Judge also awarded Mr. Patton expenses in the sum of \$269.30. Moreover, citing K.S.A. 60-237, the Judge assessed sanctions against Ms. Barger in the sum of \$330 for failing to comply with an order requiring her to provide her time records to Mr. Patton. The Judge did not address Ms. Barger's request for sanctions against Mr. Patton.

Ms. Barger contends Judge Avery erred. Ms. Barger first argues the Judge exceeded his jurisdiction by ordering her to produce an itemized record of the time and expenses she has spent representing claimant and by assessing sanctions against her. She contends K.S.A. 60-237 does not apply in workers compensation cases and, furthermore, that she complied with the order to produce by forwarding the requested information to both the Judge and Mr. Patton on February 20, 2006. Ms. Barger next contends the Judge exceeded his jurisdiction by failing to award her sanctions “for the filing by Mr. Patton of the frivolous Chapter 60 discovery pleadings.”<sup>1</sup> She argues the request for production was frivolous for two reasons – Chapter 60 discovery rules do not apply to workers compensation claims and the information requested had no relevance concerning the issue of Mr. Patton’s fees. In addition, Ms. Barger argues the Judge exceeded his jurisdiction by ordering claimant to pay for one-half of the costs for the three hearing transcripts as those hearings were unnecessary. And finally, Ms. Barger argues the Judge erred by awarding Mr. Patton expenses in the sum of \$33.27 that were incurred after August 28, 2003, when claimant discharged Mr. Patton as her attorney.

In short, Ms. Barger requests the Board to (1) deny Mr. Patton’s request for sanctions, (2) grant her request for sanctions against Mr. Patton under K.S.A. 44-536a, (3) reduce Mr. Patton’s award of expenses by the sum of \$33.27, and (4) assess the costs of the three remand hearings to Mr. Patton.

Mr. Patton also contends Judge Avery erred. Mr. Patton argues he should receive an additional \$4,450.55 in attorney fees under *quantum meruit* for the services he rendered claimant in this proceeding. In his request for sanctions against Ms. Barger, Mr. Patton also argues the Judge should have awarded him \$810 in sanctions against Ms. Barger because she should have either complied with his request for production or timely objected to his request. Finally, he requests additional sanctions against Ms. Barger in the sum of \$1,395 for attorney fees, plus additional expenses in the sum of \$10.49, for the appellate brief he filed with the Board in this appeal.

The issues before the Board on this appeal are:

1. Did the Judge exceed his jurisdiction by assessing sanctions against Ms. Barger for her alleged failure to comply with the Judge’s order for production? If not, what amount should be assessed against Ms. Barger?
2. Did the Judge err by failing to grant Ms. Barger’s request for sanctions against Mr. Patton for filing a request for production of documents citing Chapter 60 of the Kansas Statutes Annotated?

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<sup>1</sup> Ms. Barger’s Brief at 2 (filed Aug. 17, 2006).

3. Should the expenses awarded Mr. Patton be reduced by \$33.27 as those expenses were incurred after Mr. Patton was discharged as claimant's attorney?
4. Who should pay the costs for the three hearing transcripts that were created on remand?
5. What attorney fees should Mr. Patton receive for the services he rendered claimant in this claim?

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After considering the record and the arguments presented by Ms. Barger and Mr. Patton, the Board finds and concludes:

Mr. Patton began representing claimant in 2000. In late August 2003, claimant terminated Mr. Patton's services in this claim and several days later entered into a contract with Ms. Barger to represent her. Before Mr. Patton was terminated, however, respondent began paying claimant permanent disability benefits for a 10 percent whole person functional impairment rating. According to the parties, respondent paid claimant \$12,091.86 based upon that impairment rating.

After being hired by claimant, Ms. Barger litigated this claim to an award. Respondent appealed that award, which was entered on April 13, 2005, to this Board. By Order dated September 30, 2005, the Board granted claimant permanent partial disability benefits under K.S.A. 44-510e for a 16 percent whole person functional impairment to July 25, 2003, followed by a 56.75 percent work disability (a permanent partial general disability greater than the functional impairment rating).

In the April 13, 2005, Award, Judge Avery also addressed Mr. Patton's attorney fees lien. After learning of the Award and the appeal, Mr. Patton intervened in the appeal regarding the sole issue of his attorney fees. This Board determined Mr. Patton had not been given an opportunity to address his request for attorney fees and, therefore, the Board remanded this claim to Judge Avery to reconsider that issue.

After the remand, in November 2005, Mr. Patton filed a request for Ms. Barger to produce copies of her employment contract, time records, and expense records. In that pleading, Mr. Patton cited a discovery statute from Chapter 60 of the Kansas Statutes Annotated. After receiving no response to his request for production, on January 11, 2006, Mr. Patton filed a motion to compel discovery and for sanctions. Ms. Barger responded on January 16, 2006, by filing a response to the motion to compel and, in addition, requested sanctions under K.S.A. 44-536a against Mr. Patton.

Claimant, Ms. Barger, and Mr. Patton appeared before Judge Avery on February 3, 2006. At that hearing, Mr. Patton argued he should receive sanctions against Ms. Barger in the sum of \$810 for ignoring his request for production and an award of attorney fees in the sum of \$6,840 (of which \$1,657.12 had been paid) and expenses in the sum of \$269.30. Mr. Patton requested the additional fee as his contract with claimant required claimant to pay him \$120 per hour for his services in the event he was discharged. Ms. Barger questioned the time Mr. Patton allegedly expended on his itemized statement. Noting that he had not yet approved Ms. Barger's contract of employment or attorney fees in this claim and noting that Ms. Barger questioned the time Mr. Patton expended on certain services, the Judge concluded Ms. Barger should produce her time records. Consequently, at the hearing the Judge directed Ms. Barger to provide her time records to both Mr. Patton and the Court.<sup>2</sup> The Judge then continued the hearing until after Ms. Barger had complied.

On May 19, 2006, the hearing was reconvened. Mr. Patton again argued he should receive the additional attorney fees based upon his contract with claimant. In addition, Mr. Patton noted he had not been provided Ms. Barger's time records.

Ms. Barger, on the other hand, presented the testimony of Randall Fisher regarding the reasonableness of the time Mr. Patton purportedly expended on behalf of claimant. Mr. Fisher, who has served as a district court judge and also has experience in workers compensation law, testified there were certain areas where he questioned or was puzzled regarding the time shown in Mr. Patton's itemized billing statement. Conversely, Mr. Fisher's testimony also indicates there are questions regarding Ms. Barger's entries. More importantly, Mr. Fisher opined that Mr. Patton's request for \$6,840 in attorney fees was not reasonable in this matter. Instead, Mr. Fisher indicated a reasonable fee would be 25 percent of the 10 percent permanent partial disability respondent began paying while Mr. Patton represented claimant.

Claimant also testified at the May 19, 2006, hearing. Concerning her contract of employment with Mr. Patton, claimant testified she was not aware it contained a provision that she would pay attorney fees in the sum of \$120 per hour if she discharged him. Claimant, who primarily speaks Spanish, also denied having an interpreter read Mr. Patton's contract of employment to her before she signed it.

Because of the allegations made at the May 19, 2006, hearing surrounding Mr. Patton's contract of employment, the Judge continued the hearing to give Mr. Patton time to respond and determine if there was any additional evidence he would like to present.

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<sup>2</sup> M.H. Trans. (Feb. 3, 2006) at 25-28.

The hearing reconvened on July 7, 2006. The Judge denied Mr. Patton's request to call Ms. Barger as a witness on the basis that the area of inquiry Mr. Patton wished to pursue with Ms. Barger was not relevant. But the Judge did permit Mr. Patton to respond to Mr. Fisher's testimony and respond to claimant's testimony regarding his contract. Both Mr. Patton and Ms. Barger repeated their requests for sanctions against the other. At the conclusion of that hearing, the Judge denied Ms. Barger's request to assess the costs of the hearing transcripts to Mr. Patton. Instead, the Judge directed the costs be split.<sup>3</sup>

Finally, the record does not disclose that either Ms. Barger's contract of employment with claimant or her attorney fees have been approved for the services that she has provided in this claim.

### **Attorney fees**

The Workers Compensation Act provides that attorney fees charged an injured worker in an original claim for compensation shall not exceed a reasonable amount and shall not exceed 25 percent of the compensation recovered.

With respect to any and all proceedings in connection with any initial or original claim for compensation, **no claim of any attorney** for services rendered in connection with the securing of compensation for an employee or the employee's dependents, whether secured by agreement, order, award, or a judgment in any court **shall exceed a reasonable amount for such services or 25% of the amount of compensation recovered** and paid, whichever is less, in addition to actual expenses incurred, and subject to the other provisions of this section.<sup>4</sup> (Emphasis added.)

The Act further provides that all attorney fees regarding an initial claim for compensation shall be fixed in a written contract, which shall be filed with, and is subject to the approval of, the Director of the Division of Workers Compensation. And in determining the reasonableness of a fee, K.S.A. 44-536(b) states the following factors shall be considered:

1. The written offers of settlement made by the employer before the worker and attorney entered into their contract;
2. The time and labor required, and the novelty and difficulty of the issues involved and the skill required to perform the legal services properly;

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<sup>3</sup> Attorney Fees Hearing Trans. (July 7, 2006) at 14.

<sup>4</sup> K.S.A. 44-536(a).

3. The likelihood, if apparent to the worker, that accepting the worker's claim would preclude other employment by the attorney;
4. The fee customarily charged in the community for similar services;
5. The amount of compensation involved and the results obtained;
6. The time limitations imposed by the worker or the circumstances;
7. The nature and length of the professional relationship with the worker;
8. The experience, reputation and ability of the attorney.

Moreover, all disputes regarding attorney fees shall be determined by the administrative law judges after notice to those involved.

Any and all disputes regarding attorney fees, whether such disputes relate to which of one or more attorneys represents the claimant or claimants or is entitled to the attorney fees, **or a division of attorney fees where the claimant or claimants are or have been represented by more than one attorney**, or any other disputes concerning attorney fees or contracts for attorney fees, shall be heard and determined by the administrative law judge, after reasonable notice to all interested parties and attorneys.<sup>5</sup> (Emphasis added.)

Claimant has been represented by two attorneys in this claim. Consequently, the issue regarding attorney fees entails the division or apportionment of fees between those two attorneys. Unless Ms. Barger is waiving a fee for the services she rendered in this claim, her fee should likewise be determined along with Mr. Patton's.

In *Madison v. Goodyear Tire & Rubber Co.*,<sup>6</sup> the Kansas Court of Appeals ruled that attorneys who are discharged before the contingency provided in a contingency fee contract may not, generally, recover the contingency fee. Instead, the fees are to be determined based upon the reasonable value of the services the attorney has rendered, or under *quantum meruit*. And in that same opinion, the Kansas Court of Appeals cited both *In re Phelps*<sup>7</sup> and *Shouse v. Consolidated Flour Mills Co.*<sup>8</sup> as establishing a similar rule when

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<sup>5</sup> K.S.A. 44-536(h).

<sup>6</sup> *Madison v. Goodyear Tire & Rubber Co.*, 8 Kan. App. 2d 575, 663 P.2d 663 (1983).

<sup>7</sup> *In re Phelps*, 204 Kan. 16, 459 P.2d 172 (1969), *cert. denied* 397 U.S. 916 (1970).

<sup>8</sup> *Shouse v. Consolidated Flour Mills Co.*, 132 Kan. 108, 294 Pac. 657 (1931).

attorneys are discharged before completing the contracted services for stipulated attorney fees.

Based upon the above authorities, the Board denies Mr. Patton's request that his contract of employment with claimant be enforced to award him attorney fees based upon either a percentage or the contracted rate and the number of hours he expended representing claimant. Instead, Mr. Patton's attorney fees should be based upon the reasonable value of the services rendered.

As indicated above, the Workers Compensation Act requires the Division of Workers Compensation to apportion the attorney fees when a worker has been represented by more than one attorney. Consequently, in order to apportion attorney fees, Ms. Barger's contract of employment and her attorney fees must also be addressed.

A workers compensation claim moves through numerous stages as the claim progresses from the initial injury through medical treatment to maximum medical improvement to quantifying the worker's permanent disability and the ultimate award of benefits. And services rendered in the initial stages of the claim may or may not contribute to the ultimate recovery and, therefore, those services may be a factor in determining the reasonable value of an attorney's services. In addition, there is only a finite amount of funds that can be used to compensate the attorneys who assisted claimant in this proceeding. To the extent one attorney receives a fee, the amount available to the other attorney may be reduced.

The Board is not ruling, at this juncture, the attorney fees Judge Avery awarded Mr. Patton were not reasonable. Rather, the Board is ruling that both Mr. Patton's fees and Ms. Barger's fees should be considered together and apportioned. And, as provided by K.S.A. 44-536(a), neither should receive a fee for more than what is reasonable for the services rendered.

When resolving disputes under K.S.A. 44-536(h), the director of workers' compensation has the power and discretion to apportion fees. However, he must exercise such power and discretion in a reasonable and proper manner, considering the particular circumstances of each case.<sup>9</sup>

In short, this claim should be remanded to determine and to apportion between Mr. Patton and Ms. Barger the total amount of attorney fees that are to be paid for the services rendered in this claim.

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<sup>9</sup> *Madison*, 8 Kan. App. 2d 575, Syl. ¶ 5.

### Sanctions

As indicated above, the Judge assessed sanctions against Ms. Barger in the sum of \$330 for failing to comply with an order to provide her time records to Mr. Patton. Conversely, the Judge did not address Ms. Barger's request for sanctions against Mr. Patton.

Ms. Barger challenges the Judge's authority to assess sanctions against her and challenges the Judge's finding that she failed to comply with his order to produce and provide certain documents to Mr. Patton.

Unlike Chapter 60 of the Kansas Statutes Annotated, the Workers Compensation Act does not have specific statutes that address the rules of discovery. Likewise, administrative rules and regulations have not been adopted regarding discovery in workers compensation claims. But, the Act does grant the administrative law judges broad powers to compel the production of documents to the same extent as rests with the district courts. K.S.A. 2005 Supp. 44-551(b)(1) provides, in pertinent part:

Administrative law ***judges shall have power to*** administer oaths, certify official acts, take depositions, issue subpoenas, ***compel*** the attendance of witnesses and the production of books, accounts, papers, documents and records ***to the same extent as is conferred on the district courts of this state***, and may conduct an investigation, inquiry or hearing on all matters before the administrative law judges. (Emphasis added.)

There is no question the district courts are empowered to sanction litigants for failure to comply with its orders. Empowered to compel the production of documents to the *same extent as is conferred on the district courts*, the administrative law judges, likewise, have the power to sanction. Consequently, Ms. Barger's argument that Judge Avery lacked the jurisdiction to sanction her must fail.

Ms. Barger argues she complied with the order to provide her time records to Mr. Patton. Conversely, Mr. Patton denied receiving them. Ms. Barger's letter to Judge Avery that accompanied the records did not indicate a copy was sent to Mr. Patton. Based upon those facts, Judge Avery determined Ms. Barger failed to comply with his order and, therefore, should pay Mr. Patton \$330 in sanctions. The Board finds that order is reasonable and should be affirmed.

Mr. Patton requests sanctions against Ms. Barger under K.S.A. 60-237 in the sum of \$810 for her failure to either comply with his request for production of documents or timely object. As indicated above, the discovery statutes of Chapter 60 of the Kansas Statutes Annotated do not directly apply to a workers compensation proceeding although



an administrative law judge may look to them for guidance to determine what powers the judge may have under K.S.A. 2005 Supp. 44-551(b)(1). Moreover, the Board is not persuaded to increase the sanctions levied against Ms. Barger.

Finally, the Board notes Judge Avery did not address Ms. Barger's request for sanctions against Mr. Patton for allegedly filing frivolous pleadings. As the Board is remanding this claim to apportion the attorney fees between Ms. Barger and Mr. Patton, the Judge should likewise address Ms. Barger's request under K.S.A. 44-536a for sanctions against Mr. Patton. Likewise, the Judge should address Mr. Patton's request for additional sanctions for this appeal.

### **Expenses and transcript costs**

The Judge granted Mr. Patton's request for a reimbursement of expenses. Included in those expenses was a charge for \$33.27 in expenses that were incurred after he was discharged as claimant's attorney. While the claim was on remand, the Judge also directed Ms. Barger and Mr. Patton to evenly divide the transcript costs that were being incurred over the dispute regarding attorney fees.

Mr. Patton represents that those expenses were incurred for miscellaneous charges that pertained to transferring the file and terminating his services. The Board finds the expenses in question appear to be directly related to Mr. Patton's representation of claimant and, therefore, he should be reimbursed. Accordingly, the Board affirms the Judge's order awarding those expenses to Mr. Patton.

Likewise, the Board affirms the Judge's order to share the transcript costs. The Board rejects Ms. Barger's argument that the three hearings were unnecessary. Indeed, the record establishes the three hearings resulted from the issues that developed as Ms. Barger and Mr. Patton advanced their theories. Indeed, the first hearing was continued to allow Ms. Barger time to provide her time records to Mr. Patton; the second hearing (at which Mr. Patton advised he had not received Ms. Barger's records) entailed Ms. Barger presenting expert testimony regarding the reasonableness of Mr. Patton's requested fees and Ms. Barger presenting claimant's testimony concerning the execution of the contract with Mr. Patton; and the third hearing was a continuation of the second hearing as the Judge allowed Mr. Patton an opportunity to respond to the evidence and issues that were raised at the second hearing.

Under K.S.A. 44-555, the administrative law judge has the power to assess all or part of a shorthand reporter's fee to any party to the proceeding. At this stage of the proceeding, Ms. Barger and Mr. Patton are parties as it is their attorney fees that are in issue. The Kansas Court of Appeals recognized that attorneys are parties to a proceeding for attorney fees in *Madison* when the Court stated in its introductory paragraph:

The title to this case is confusing in that the only parties who will be affected by the decision herein are appellant Frank D. Taff, an attorney, and appellee Reginald LaBunker, also an attorney. This is because the sole issue herein involves the amount of attorney fees to which each of the aforementioned parties is entitled.<sup>10</sup>

The Board finds the equal division of costs between Ms. Barger and Mr. Patton is fair and reasonable. Accordingly, the Judge did not err by directing the attorneys to share the transcript costs.

**WHEREFORE**, the Board affirms the Judge's order assessing sanctions in the sum of \$330 against Ms. Barger, affirms the Judge's award of expenses to Mr. Patton, and affirms the Judge's decision that Ms. Barger and Mr. Patton should evenly share the transcript costs. But the Board remands the proceeding to Judge Avery to simultaneously address the attorney fees to be awarded both Ms. Barger and Mr. Patton, and to address Ms. Barger's request for sanctions and Mr. Patton's request for additional sanctions related to this appeal.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of September, 2006.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Diane F. Barger, Attorney for Claimant  
Michael G. Patton, Former Attorney for Claimant  
Gregory D. Worth, Attorney for Respondent

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<sup>10</sup> *Madison*, 8 Kan. App. 2d at 576.